Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 95.

AMERICAN ICE COMPANY AND WILLIAM G. JOHNSON, ASSIGNEE, APPELLANTS,

vs.

EASTERN TRUST AND BANKING COMPANY, APPELLEE.

STATEMENT OF THE CASE.

On March 25, 1896, the appellee exhibited its bill in the Supreme Court of the District of Columbia, holding an equity court for said District, against the appellants, The American Ice Company and William G. Johnson, its assignee, Edward M. Willis, and certain fire insurance companies of the District of Columbia, for the purpose of foreclosing a mortgage of certain real estate, for the appointment of a receiver, and for an accounting for rents and profits, and for certain insurance money received by the appellant, William G. Johnson, as assignee of the said American Ice Company. The ice and banking companies were organized under the laws of the State of Maine, and the mortgage, or deed of trust in the nature of a mortgage, was made in that State, and embraced certain real estate, situate in the county of Penobscot, State of Maine, and certain real estate, situate in this

urisdiction. The deed of trust was made by the American Ice Company to the appellee, to secure the payment of certain bonds, amounting in the aggregate to $40,000, payable in instalments of $5,000 each, in from three to ten years rom December 1, 1899. The bonds were made payable to the appellee, or bearer, and were by it, in accordance with the authority given, sold and delivered to various persons, for full value, before maturity. A portion of said property embraced in said trust, which was situated in the State of Maine, as aforesaid, was improved by ice houses, engines, machinery and appliances, such as are commonly employed n that State in the harvesting of ice. The property that it claimed to own in the District of Columbia, was located opposite square No. 270, one of the squares of the city of Washington, and was situate within the limits of the bed of the Potomac river. The last-named property was improved by a wharf and ice houses for storing and distributing the ice gathered in the State of Maine and brought here for sale.

The deed of trust provided that the grantor therein should retain possession of said property until default should be made in the payment of interest on said indebtedness, or in payment of insurance or taxes on said real estate; it further provided that if default should be made by the American Ice Company in the payment of said bonds, or any of them, in accordance with their tenor and effect, and such default should continue for ninety days, then the whole amount of principal and interest remaining unpaid, *should be deemed immediately due and payable*, and it should be lawful for such trustee to enter and take possession of said property, for the purpose of sale. By the terms of said trust, the property was required to be sold at public auction in the city of Bangor, upon such terms as to credit and payment, as the appellee might deem proper or expedient, having first given public notice of the time and place of the sale or sales by advertisements published not less than once a week for four successive weeks, in one or more newspapers

printed and published in the cities of Bangor and Washington. The power of sale in said trust further provided that the trustee should have the power *to adjourn the sale from time to time, in its discretion*, giving reasonable notice of such adjournment, *and after so adjourning, to make the sale at the time and place to which the same might be adjourned*, and *that no other or further notice should be required.* The trustee was authorized to convey to the purchaser the premises sold, and to apply the proceeds of sale, first, to pay the expenses thereof, together with its just and lawful charges for services and expenses, including reasonable allowance for attorney and counsel fees, and also all advances and expenses reasonably incurred by the trustee in operating, maintaining and managing the business of the Ice Company while in possession thereof, and all payments made by the said trustee for taxes, assessments, insurance and other proper charges upon said property; the balance of said proceeds of sale was to be paid over ratably to the parties holding said bonds. The said deed of trust provided that the bondholders, or any number of them, or any person in their behalf, should have the right to purchase, at any such sale, made as aforesaid.

The deed of trust contained a special covenant that the American Ice Company should and would pay all taxes and assessments, *and keep said property at all times insured*, in such insurance companies as might be approved by said trustee, in such amounts as should reasonably protect all the insurable property, payable in case of loss to the trustee, as interest might appear. In case of loss, the insurance money *to be applied by the trustee for the renewal of or additions to the property destroyed*, or at the option of the trustee, the money might be invested, on such security as it might approve, as a sinking fund for the redemption of the bonds when due, or—

> "be applied to the redemption of the bonds, or the principal of such of the bonds as may be at the time due and unpaid."

The first instalment of bonds secured by said trust, fell due in December, 1892, and was paid, together with the interest then accrued and due upon all the bonds. The next instalment of interest which became due in December, 1893, was not paid at maturity, nor was the interest thereon paid. Before this default, to wit, on the 13th day of October, 1893, the said Ice Company made an assignment of all its property and effects, to the defendant, William G. Johnson, for the benefit of all its creditors. This assignment was accepted by Johnson, and by virtue thereof he leased the property of the Ice Company, located in the city of Washington, embraced in said deed of trust, to Edward M. Willis, on the 29th of January, 1894, for a rental of $130 per month. The rent accruing under said lease, until the property was burned down, was received by the appellant Johnson, as assignee, as aforesaid. All the improvements upon the property situate in this jurisdiction, were destroyed by fire the 11th of January, 1896. After default in the payment of principal and interest, and upon request of the requisite number of bondholders, all the property embraced in said trust was advertised to be sold at public auction, in the city of Bangor on the 9th of May, 1894, and in the advertisement it was stated that the terms and conditions of said sale would be announced by said trustee, at the time and place of said sale. The terms were so announced, and no bid being received at that offer, the sale was postponed until the 8th of June, of the same year, to take place at the place where the first offer was made. Notice of the postponement was duly given, and in accordance with this second notice of postponement, the property was offered a second time, but no adequate bid was received, and the sale was again postponed until September 8, 1894, due notice thereof having been given.

At the last offer of the property bids were received for both parcels of property, and that situated in the city of Washington, as well as that in the State of Maine, were bid

in by a committee of bondholders. The property in Maine was struck off at such sale to the highest and best bidder, at and for the sum of $14,500; the Washington property was struck off to the same bidder for $14,000; but the sale of the latter property was never perfected, was abandoned by the committee, and consequently remained at the time of filing said bill, in the trustee under said deed of trust, undisposed of and liable to sale for the benefit of the bondholders. There was no conveyance made by the Trust Company to the purchaser of the Maine property, and the same was held by the trustee, and was rented out, and the rents received by it until March, 1897, when the property was sold to the Consolidated Companies of New York for the sum of $16,500, and the committee of bondholders and the Trust Company joined in the conveyance to make title.

The proceeds of the sale made to the Consolidated Companies, together with the rent received by the Trust Company, after deducting what it claimed for expenses, administration, etc., were by said Trust Company distributed to the bondholders pro rata, paying 39 per cent of the face value of said bonds, leaving 61 per cent still due and owing, beside interest.

Some time after the general assignment of the Ice Company to the defendant Johnson, the latter, as assignee, took out several policies, on what he claimed to be his interest as assignee in the property located in Washington, to the amount of $3,000. The improvements on the property were totally destroyed by fire, as hereinbefore stated, in February, 1896. The insurance money was paid over to Johnson, as assignee, who was, at the time of the insurance, and for some time thereafter, in possession of the property. The premiums on the policies were paid out of the assets of the American Ice Company. The money received by the said Johnson for such insurance was paid to him and held under a stipulation to abide the final determination of this case. Such, in substance, were the averments of complainants'

bill. The bill asked first for the appointment of a receiver to take charge of the property in this District; second, that the appellant Johnson, as assignee, as aforesaid, be required to account to said Trust Company for the rents, income and profits received from said property in this District, from the time of notice served and demand made for the possession of the property, and his refusal of such demand, until the time of accounting; third, that the said Johnson, as assignee, be required to pay into the registry of the court, to abide its final decree in the case, the money received from the insurance companies, on the policies of insurance obtained by him on the property in this District, which was destroyed by fire, and that the complainant be decreed to be entitled to a lien or equitable right to such money, to better secure the bonded indebtedness; fourth, that a decree of foreclosure be passed and that the property be sold for the payment of the mortgage debt, and, lastly, for general relief.

The appellants separately answered said bill, and admitted most of the facts therein alleged, but controverted the right of said Trust Company to the relief sought by it. They denied the right to have a receiver appointed, and to an accounting for rents received or for the insurance received by the appellant, the said Johnson, as assignee. They further denied the right for a decree of foreclosure and sale of the property in the District of Columbia, until an accounting was regularly taken and had for the sale and rent of the property situate in the State of Maine.

Justice Cox, who heard the case in the Supreme Court of the District of Columbia, denied all the relief prayed for by appellee, except the right of foreclosure and sale of the mortgaged premises for the payment of the balance of $21,350 on the bonded indebtedness, with interest thereon from the second day of December, 1892, as ascertained and declared by said decree, without the statement of any preliminary account. Sale was decreed and trustees appointed

to make said sale. From that decree both parties appealed to the Court of Appeals of the District of Columbia.

The case came to a hearing in the Court of Appeals, and that court sustained the court below as to the right of the appellant to have a receiver appointed, and to receive the rents, issues and profits of said property in the District of Columbia, as prayed for in said bill; and reversed it on the other points in the case, holding that the appellant Johnson, as assignee of the Ice Company was accountable to the mortgage creditors for the insurance money received by him under the policies taken out by him as assignee, as set out in complainant's bill; and further holding that there should have been an accounting by the appellee, of the proceeds of the property situated in Maine, before a decree of foreclosure could properly be passed. The decree of the court below was reversed, and the cause remanded for further proceedings.

Trust and Banking Co. *vs.* Ice Co., 14 App. D. C. 325.

After the remanding of the case, it was referred to the auditor for the purpose of ascertaining the amount due on the bonds secured by the deed of trust. Additional evidence was taken in the case solely for the purpose of ascertaining the amount of the indebtedness, and the auditor's report was filed in the case on the 21st of March, 1900. No exceptions were filed thereto by appellants, and on the 24th day of the following month, the appellee directed the clerk to calendar the case for the May term of court. Notice of the order was not given to appellants, and they moved to strike the case from the calendar for that reason; this motion the Supreme Court of the District of Columbia declined to grant, and by decree of the 15th day of May, 1900, ratified and confirmed the auditor's report, and passed a decree putting the appellee in possession of the property situate in

this jurisdiction, and enjoining the appellants from interfering with such possession. The amount found to be due on account of the bonded indebtedness secured by said deed of trust was $28,038.50, with interest from the 13th day of March, A. D. 1897. The decree of sale was in the usual form. It was further decreed that in the event the proceeds arising from the sale authorized by said decree be insufficient to pay and discharge, in full, the bonded indebtedness, then, and in such an event, it was decreed to be the duty of the said William G. Johnson, as assignee, as aforesaid, and he was directed to pay unto the trustees in said case appointed to make said sale, the said sum of $3,000 paid by the said insurance companies to him, under a certain stipulation in said cause filed; or so much thereof as might be necessary to pay said deficit; not to exceed, however, the sum of $3,000 (Rec. pp. 121, 122, 123).

From this decree appellants appealed to the Court of Appeals of the District of Columbia, where the decree below was affirmed, with costs, with a modification, however, that the amount of the indebtedness secured by the mortgage be reduced to $26,282.86. As so amended, the cause was remanded to the Supreme Court of the District of Columbia, with directions to carry its decree, so modified, into effect (Rec. p. 32). From this decree, the case was brought by appeal to this court.

BRIEF AND ARGUMENT.

I.

"The court erred in decreeing the proceeds of the insurance policies to the complainant, trustee."

The question raised by appellant's first assignment of error was finally answered by the judgment of the Court of Appeals of the District of Columbia; and the judgment

of that court thereon can not be reviewed by this court. The amount in dispute is less than $5,000. The amount due upon the bonds secured by the mortgage was agreed upon, and was never at issue between the parties to this litigation (Rec. p. 16). Appellants contended that they were entitled to an accounting of the proceeds derived from the property situated in Maine, before a decree of sale to enforce the mortgage could be properly passed. Such an accounting was had, and the auditor filed his report, which definitely ascertained the net balance of proceeds derived from the sale of the Maine property, properly applicable to the liquidation of the mortgage indebtedness. That report was filed in this case by the auditor; appellants made no exceptions thereto, and it was duly ratified and confirmed. That confirmation settled at once, and forever, the question of the amount due upon the bonds secured by the mortgage, was not reviewed by the Court of Appeals, and can not be opened or considered here. This court, speaking through Chief Justice Waite, in the case of Gray *vs.* Blanchard, said:

> "We hear the case upon the record which is sent up, and if, taking the whole record together, it appears that we have no jurisdiction, the case must be dismissed."
>
> 97 U. S. 564.

The case of Tintsman *vs.* The National Bank is directly in point. In this case the court said:

> "This writ of error was brought by the defendant below to reverse a judgment against him of more than five thousand dollars; but on looking into the record we find that the case was heard on an agreed statement of facts in the nature of a special verdict, in which it appeared that the plaintiff claimed of the defendant eight thousand two hundred and thirty-three dollars and seventy-nine cents, and interest from June 4, 1876. The defendant admitted that he owed of this amount five thousand and ninety-nine dollars and fifty-nine cents, for which the plaintiff

> was entitled to a judgment. The only controversy was as to the liability of the defendant for the difference between what he admitted to be due and what the plaintiff claimed, or three thousand one hundred and thirty-four dollars and twenty cents. This, then, is the amount actually in dispute, and as it is less than five thousand dollars, we have no jurisdiction."
>
> 100 U. S. 6.

Justice Brown, speaking for the court, in the case of New England Mortgage Co. *vs.* Gay, said:

> "It is clear that, while the plaintiff sued to recover $8,500 and interest, he actually recovered $6,800 and interest, and attorney fees, amounting in all to $9,725.66; so that the amount actually in dispute between the parties in this court is the difference between the amount claimed and the amount of the verdict."
>
> 145 U. S. 127.

See, also, in this connection:

> Jennings *vs.* Citizens' National Bank of Rome, 110 U. S. 52.
>
> Wabash, St. Louis, Etc., Rwy. *vs.* Knox, 110 U. S. 304.
>
> Hilton *vs.* Dickinson, 108 U. S. 165.

Assuming, however, that the question raised by this assignment of error can be considered by this court, appellee respectfully submits that the judgment of the court below upon that question was correct, and ought to be affirmed.

The covenant to insure contained in the deed of trust in controversy, is in the following language, to wit:

> "The American Ice Company hereby expressly covenants and agrees . . . to keep said premises and property at all times insured in such insurance companies as may be approved by the trustee in such amounts as shall reasonably protect all the insurable property, payable in case of loss to the

trustee as its interest may appear. In case of loss the insurance money *may be applied by the trustee toward the renewal of, or additions to the property destroyed or injured, or at the option of the trustee the money may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due or be applied to the payment of the principal of such of the aforesaid bonds as may be at the time due and unpaid, and of the interest which may have at that time accrued upon the principal and be unpaid, without discrimination or preference.*"

Then follows a provision not important to be here considered (Rec. p. 27, Art. 7).

That this covenant to insure runs with the land, and is not a mere personal obligation of the covenantor, is a proposition abundantly supported by authority.

In the case of Thomas *vs.* Vonkapff, the facts were substantially as follows: Appellant's testator had loaned to appellee's intestate the sum of $20,000 and took as security for the payment of the same a mortgage on certain lots and improvements in the city of Baltimore. The mortgage contained a covenant providing that the mortgagor and his personal representatives should, during the existence of the mortgage, at his own cost, procure an insurance against loss by fire, to the amount of $19,000. That, in the event of loss the insurance money should be immediately applied to rebuilding and replacing the buildings so injured or destroyed, so that the property should be kept in like order and condition as when the mortgage was given.

Part of the improvements on the property were destroyed by fire. The buildings upon the property at the time of the loss were insured for 10,000, which was paid by the insurance company to the mortgagor. The insurance money was not applied to the restoration of the buildings, and remained on deposit to his credit in the Maryland Savings Institute at the time of his death; subsequently the mortgage was foreclosed and the property sold thereunder, producing a

net sum of $8,225.69. The estate of decedent was insolvent, and his personal representatives contended that the insurance money belonged to the estate, to be applied in satisfaction of the claims of the general creditors. In the course of its opinion, the court said:

> "That this is a covenant running with the land, can, we think, scarcely be doubted. The covenants to repair and rebuild are undoubtedly so, and what is this, in effect, but a modified covenant to repair and rebuild? The insurance is to be kept up so that in case of loss by fire the sum insured shall be immediately applied in rebuilding the property on the premises. Being of this character it would run with the land, just as would an absolute covenant to repair or rebuild; and running with the land, the record of the mortgage would be notice to all the general creditors, and they would have no just pretensions to participate in the fund, to the prejudice of the particular creditors."
>
> 6 G. & J. 251.

In the case of Vernon *vs.* Smith, the question was as to whether the covenant to insure runs with the land so as to bind the assignee. The court held that by virtue of the Statute of 14 George III, Ch. 78, the owner had the right to have the insurance money applied to rebuild the property destroyed by fire, and that the covenant to insure was therefore, in effect, a covenant to rebuild or repair at the election of the covenantee, and for that reason ran with the land.

5 Barn. and Ald. 10.

The duty created by the statute, and by the act of the parties, is no more obligatory upon them than is such an obligation arising from their express covenant.

The case of "*In re* Sands Ale Brewing Co." has many features in common with the one at bar. The brewing company borrowed certain sums of money, and gave a mortgage

on its property to secure the payment of the same. The mortgage contained a covenant that the insurance policy should be assigned to the mortgagee. That in the event the mortgaged premises should be injured or destroyed by fire, the mortgagee should have the right to collect the insurance money and apply the same in his discretion, either in the discharge of the indebtedness secured by the mortgage, or in repairing or rebuilding the buildings injured or destroyed. The insurance was made and assigned as required by the terms of the covenant in the mortgage. When the policy expired a new policy was taken out and not assigned. The buildings having been destroyed by fire, the assignee in bankruptcy had collected a part of the insurance money. This was a petition on the part of the trustee under the mortgage to have the money so collected paid to him in satisfaction of the mortgage debt. In the course of its opinion the court said:

> "The assignee in this case can hold nothing that the grantor in the trust deed could not have held, if bankruptcy had not intervened. His relation is purely representative. Creditors who have trusted the bankrupt must be held to have done so with full notice of the covenant to insure, and of the legal and equitable effect of that covenant. The covenant to insure runs with the land, as much as a covenant to repair and rebuild or for another term."
>
> 3d Bis. Rep. 175.

That a covenant to rebuild buildings destroyed or injured by fire, which were upon the property at the time of the covenant, is a covenant running with the land, was settled in Spencer's Case, 1st Smith Ld. Cas. 116.

A covenant to rebuild or repair at the election of the covenantee is as much within the principle established in this case, as though the obligation were absolute instead of elective. If the covenant in controversy was merely a covenant to insure without more, it might be questionable whether it

run with the land or was a mere personal obligation binding the covenantor alone.

Dunlop *vs.* Avery, 89 N. Y. 596.
Reid *vs.* McCrum, 91 N. Y. 412.

In neither of these New York cases was the question here presented before the court. In neither of them was there any provision permitting or requiring the insurance money to be applied to the restoration of the buildings insured in the event of their destruction or injury, and in the latter case the court expressly declared that it had no purpose of deciding what would be the effect of such a covenant.

In the case of Dunlop *vs.* Avery, the contest was between a senior and a junior mortgagee, as to which had priority to the proceeds arising from an insurance upon the mortgaged property. Both mortgages contained a covenant on the part of the mortgagor to insure for the benefit of the mortgagee. The first mortgage was recorded before the second was made. When the second mortgage was made, the policy of insurance was taken out, and the loss made payable as interest might appear, to the mortgagee. This insurance was kept up, until the property insured was destroyed by fire; at which date the policy of insurance previously taken out for the benefit of the first mortgage had lapsed. The second mortgagee had no actual notice or knowledge of the existence of the first mortgage, and only such notice thereof as was imported by the record of the first mortgage. Under these circumstances, the question arose whether the first mortgagee had such an equitable right to the money arising from the policy, as entitled him to priority over the party to whom the loss was made payable. In the course of its opinion the court said:

> "There is no doubt as to the correctness of the rule that when the mortgagor is bound by the terms of the mortgage, to keep the premises insured for the security of the mortgagee, that, *as between him and*

the mortgagor, an equitable lien arises in favor of the mortgagee, for the money received on the insurance, to the extent of the mortgage.

The deed of trust before the court was duly recorded among the land records of the District of Columbia. Such record constitutes legal notice of the contents of the instrument to all persons dealing with the title, and the covenant in question would bind even a purchaser for value. The exigency of the case does not require the court to go so far. The assignee of the American Ice Company is not a purchaser for value. He is a mere volunteer.

The assignee under an assignment for the benefit of creditors is the representative of the assignor and not the representative of the creditors, and can not, therefore, take to himself any of their rights. He is not a purchaser for value. The property covered by the assignment is subject to all the equities and liens which exist against it in the hands of the assignor. He succeeds to and enjoys the rights of the assignor, and none other, except that the property in his hands is not liable to execution. He is but the assignor himself so far as the rights of the creditors are concerned.

Burrell on Assignments, 391, and cases cited.

In the case of Chipman *vs.* Carroll the court held that where there is an agreement between the mortgagor and the mortgagee that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the mortgagor takes out a policy of insurance in his own name which is not assigned to the mortgagee or made payable to him in any way, the mortgagee has an equitable lien upon the proceeds of the policy, and that this agreement might be shown by parol evidence. The clause in the mortgage referring to insurance in this case was in the following language:

"But if default be made in such payment, or any

part thereof, or the interest thereon, or the taxes, or if the insurance is not kept up thereon, then this conveyance shall become absolute."

25 L. R. A. 305.

The covenant on the part of the American Ice Company to keep the premises insured for the benefit of the bondholders gave to the trustee under the deed of trust an equitable right to a lien upon the policy when taken out and upon the insurance money in case of the loss or destruction of the property insured. This right is not affected by the failure of the covenantor to have the policy made payable to the trustee, as was required by its terms, nor could it have been defeated even by an assignment of the policy for the benefit of other creditors. It is a right binding not only the grantor in the trust, but its assignee in bankruptcy, and even a purchaser for value with notice.

In Thomas *vs.* Vonkapff, supra, the court said:

> "The mortgagee had undoubted right to the fund thus arising (that is from the insurance) which could not be overreached by Thomas or his creditors, and if the property was clothed with a trust, his legal representatives would also take it clothed with the same trust. The mortgagee, as between himself and the mortgagor, had, in virtue of the covenant to keep up the insurance, a qualified lien on the amount of insurance, that is he had a right which attached itself to the fund, not a right to be sure which would divest the mortgagor of his possession, but a right which would cling to the fund until it was expended for his benefit, to the extent of his lien under the mortgage. The mortgagor in his lifetime could never have diverted the fund from its destined object; it would pass to his administrators clogged with the same equitable lien with which it was encumbered in the mortgagor's lifetime. The particular creditor and the general creditor stand in different attitudes. The former never trusted to the personal credit of the mortgagor, but trusted and looked to this par-

> ticular fund to satisfy his debt, or give him security for it; the general creditors trusted to a personal credit alone."

The doctrine here announced was followed in Geddings *vs.* Seevers, 24 Md. 372.

So in *In re* Sands Ale Brewing Co., *supra*:

> "The assignee could hold nothing in this case, which the grantor in the trust deed could not have held, if bankruptcy had not intervened. The creditors who have trusted the bankrupt, must be held to have done so with full notice of the covenant to insure, and of the legal and equitable effect of that covenant."

Continuing the court said:

> "My conclusion then is that the covenant of the bankrupt to insure operated to assign in equity to the petitioner, the benefit of any insurance effected by the bankrupt on the mortgaged property. It is no answer to say that the mortgagee might have insured in default of insurance by the mortgagor, because the mortgagor *had* insured, and his insurance inured at once to the benefit of the mortgagee. Equity made the assignment the moment the insurance was effected, if the mortgagor did not."

In the case of Miller *vs.* Aldrich, the facts were substantially as follows:

Miller became surety for one Chapman on a note of $300. To secure complainant Chapman gave a mortgage on a certain dwelling house and agreed to take out a policy of insurance for the benefit of Miller. The insurance was effected in accordance with the stipulation. Chapman subsequently sold the mortgaged premises to the defendant Aldrich, subject to the mortgage, with an oral understanding that Aldrich should keep the house insured for the benefit of complainant. The old policy was surrendered and a new one taken out in the name of Aldrich, without providing for the

protection of complainant. The building was thereafter destroyed by fire. Aldrich declined to apply the insurance money in accordance with the oral stipulation. Miller filed a bill in equity to enjoin the company from paying the money to him, and to establish a lien upon it in favor of complainant. In deciding the case Chief Justice Graves said:

> "Chapman had bound himself to afford the mortgagee security supplementary to and connected with the mortgage. The mode agreed upon had reference to the mortgaged buildings, and was to be of the nature to keep the mortgaged property itself so far intact as a means of security as to perpetuate the safety of the mortgagee's interest in case the buildings should burn. This stipulation was, in equity, a sort of adjunct to the mortgage, and was binding on Chapman and all others in his shoes with notice."
>
> 31 Mich. 411.

The evidence in the case did not show whether the mortgage itself contained any provision as to insurance or not but the case was decided upon the theory that it was immaterial whether the contract to insure was contained in the mortgage or rested in parol.

In the case of Cromwell *vs.* Brooklyn Fire Insurance Company, the facts so far as material to the point under discussion, were as follows: C held a written contract for the purchase from B of a lot, and under this contract took possession. In pursuance of a parol agreement C built a house upon the lot, and sold it so improved to E, and delivered possession to him. The agreement provided that E should pay the taxes and interest, and keep the house insured for the benefit of C. He did at first procure an insurance in his name, which was payable to the vendor. The policy having expired, E took out another one in his own name. C assigned his contract of sale to complainant. The house was destroyed by fire. Complainant notified the de-

fendant company of his lien upon the policy. Notwithstanding this, the defendants paid the amount due upon the policy to E. This was a suit against the company to establish a lien upon the fund. The court held complainant entitled to the relief sought, and said:

> "In the absence of any proof to the contrary, it must be inferred that he (E) made the insurance in pursuance of his agreement, and for the benefit of his vendor, and such, undoubtedly would have been the legal inference, no matter what may have been his secret intention when he effected the insurance."
> 44 N. Y. 46.

E in this case, had no contract relation with the complainant, and was under no obligation to him other than that which arose from his possession of the property to which complainant had an equitable title.

The doctrine announced in these cases is sustained by numerous authorities:

Nichols *vs.* Baxter, 5 R. I. 491.

Ellis *vs.* Crutzinger, 27 Mo. 311.

Lazarus *vs.* Commonwealth Ins. Co., 2 Amer. Ld. Cas. 834.

Grange Mill Co. *vs.* Western Assurance Co., 118 Ill. 396.

Masury *vs.* Southworth, 9 Ohio St. 348.

Chipman *vs.* Carroll, 25 L. R. A. 305.

The case of Willis *vs.* Eastern Trust and Banking Company, 169 U. S. 295, decided merely that the defendant in error had mistaken its remedy; that the relation of mortgagor and mortgagee was not that of landlord and tenant; that the statutory remedy afforded a landlord in this jurisdiction for obtaining possession of rented property where the tenant is in default, is not available to the mortgagee to obtain possession of the mortgaged premises, where the mortgagor is in default. The right of the trustee to take

immediate possession of the property covered by the trust, for the purposes of sale, was secured in express terms by a clause in the deed of trust (Rec. p. 25, Art. 2). The proper remedy was ejectment, not the landlord and tenant proceeding invoked by the trustee.

After default and demand made upon appellants for possession, their holding was tortious, and in violation of the express terms of the trust (Rec. pp. 15, 16).

The case of Cushing *vs.* Thompson, 34 Maine, 496, cited by appellants, was a bill to redeem. The mortgagor's interest had been sold under an execution against it. He remained in possession of the property after sale, and within the time allowed by the local law, within which right of redemption was reserved, filed his bill. The purchaser insured the buildings upon the property, and these were destroyed by fire before the suit was brought. The redemptioner claimed the right to have this insurance money applied to the liquidation of the debt for which the property was sold. In the course of its opinion the court said:

> "The interest insured was that of the defendant, alone. It was not apparent that the complainant paid any part of the premium, had any connection with the insurance, or knew of its existence, till the loss of the property. The defendant could not have compelled payment from the defendant of the premium, or any part of it."

The portion of the opinion quoted in appellants' brief states the general principle of interpretation applicable to a contract of insurance. The facts in the case did not involve the determination of the question under discussion, and is without bearing upon that question.

It is conceded that a contract to insure is, in general, a personal contract. If the insurance is upon improvements to land, it has, in the absence of express contract, no relation to the title of the land; but it is entirely competent

for parties, by express contract, to enlarge the scope of insurance contracts, and to bring them into relation to the title of the property insured. That is precisely what is done by the provisions relating to insurance in the deed of trust under consideration.

Chief Justice Alvey, in discussing this branch of the case, said:

> "The object of the covenant in this case is plain enough, and so the terms in which it is expressed. The American Ice Company expressly covenants to keep the property *at all times insured*, in such amounts as shall *reasonably protect* all the insurable property, payable, in case of loss, to the trustee, as its interest should appear; and in case of loss the insurance money might be applied by the *trustee toward the renewal of or addition to the property destroyed or injured*, or it might be, at the option of the trustee, placed in a sinking fund for the redemption of the bonds.
>
> "It is very clear that by the terms of the covenant it had relation to the land, and its principal object was to keep and maintain the buildings on the property in condition for carrying on the ice business. This was the great object of the insurance required, as means of security to the bondholders. Without this the property, by fire, might be rendered of little value, and the bondholders be left without security. By means of the insurance it was intended that the property should be maintained as security; and hence it was provided, primarily, that the insurance money might be expended in renewal of or adding to the buildings. In such case, it has been repeatedly held that the covenant does run with the land, at least in an equitable sense; and where an insurance has been obtained, though by an assignee, and a fire has occurred, and the insurance money has been received, a court of equity has held that the insurance money should be applied for the benefit of those for whose protection the original covenant was made."
>
> Trust and Banking Co. *vs.* Ice Co., 14 App. D. C. 331–332.

In the case of Wheeler vs. Insurance Co., it appears that one John H. Green, a planter, was indebted for advances made to him by a firm of the name of Johnson & Goodrich. To better secure them for such advances, he authorized the firm to place an insurance upon his buildings, gin house and other property. They took out two policies of insurance in their own names, on the property of their debtor, who subsequently became insolvent. The property was destroyed by fire, and the firm claimed the insurance money; but before it was paid to them, plaintiff filed suit against the Insurance company, for the purpose of intercepting the insurance money, claiming that he had a right thereto, as the assignee of three mortgages put upon the property by Green, prior to the date of the insurance. The last two of these mortgages contained a covenant on the part of Green, the mortgagor, to insure for the better security of the mortgagees. Johnson & Goodrich had no actual notice of these mortgages. There was more than sufficient money to discharge their claim, in full. The court held that they were entitled to sufficient of the insurance money to liquidate the indebtedness due from Green; but that the surplus equitably belonged to the plaintiff; and cited in support of this decision, the case of Thomas' Admrs. vs. Vonkapff's Exrs., supra, and a number of other cases cited in this brief.

Had this insurance been effected by the Ice Company, there could be no question as to the right of the appellee to intercept the insurance money, and apply it, so far as necessary, in the discharge of the bonded debt. Has the assignee of the grantor in the deed of trust, a better right to the insurance money?

101 U. S. 439.

The court below, in discussing this phase of the case, said:

> "It is certainly true that Johnson does not occupy the position of a bona fide purchaser without notice. He is in the shoes of the Ice Company, and can occupy no better position than the assignor itself, with

respect to the property assigned. His relation to the assignor is of a representative nature. By taking the assignment for the benefit of all the creditors, he did not extinguish or modify the covenant to insure, nor did he relieve the property of the charge to sustain, at all times, the insurance on the property for the protection and as an additional security of the bonds held under the mortgage. The insurance was a part, and a very important part of the scheme of security for the redemption of the bonds; and as such it should not be impaired or avoided by placing the property in the hands of an assignee. The property itself was charged with the obligation of maintaining the insurance, and Johnson, taking the property in his representative capacity, and placing himself in the position of his assignor, took the property *cum onere*. Having assets of his assignor sufficient to pay the premiums for the insurance required by the covenant, a court of equity would compel him to effect and maintain the insurance as required by the covenant. This principle is well illustrated by the case of Holmes *vs.* Buckley, Equity Cases Abridged, 26."

Trust and Banking Co. *vs.* Ice Co., 14 App. D. C. 330.

The American Ice Company had no insurable interest in the mortgaged property after the assignment. It was thereafter in no position to fulfill its covenant to keep the mortgaged premises insured for the benefit of the trust. After the assignment this obligation devolved upon the assignee. He was in possession, in pernancy of the rents and profits at the time of the fire, which occurred long after default in the mortgage, and after due demand had been made upon him for possession of the property by the trustees, as provided by the deed of trust, in subordination to which he took title. The litigation which followed demand for possession was rendered necessary by the failure of the assignee to yield possession to the trustee under said trust. Retention of possession by the assignee, and the resulting litigation, rendered it difficult, if not impossible, for the trustee under

the deed of trust to obtain any insurance upon the property.

The assignee collected the rents accruing from the property for more than two years after the American Ice Company made default in the payment of its bonds, and after demand was made upon him for possession. Out of these rents, he kept the property insured, and when it was destroyed by fire, proposes to keep the balance of the rents and the money derived from the insurance.

It is respectfully submitted, first, that the covenant relating to insurance, contained in the deed of trust, is one which runs with the land; second, that the claim of the trustee to the insurance fund is equitably superior to the claim of the general creditors, and ought to prevail in this case.

II.

"The Court erred in not remanding the case to the court below for further proceedings."

In the predicament in which this case was when it was heard in the Supreme Court of the District of Columbia, it was not necessary that it be placed on the calendar at all.

The only question remaining open was as to the amount due on the bonds secured by the deed of trust; all the other questions in the case were settled by the decision of this court in the case of Trust and Banking Co. *vs.* American Ice Co., *supra*. The amount due upon the bonds were ascertained by the auditor's report, and no objections having been filed to that report, within the time allowed by law for making such objections, it was absolutely conclusive upon the parties; it could not be questioned in the court below, and can not be questioned here. The appellee was entitled to a confirmation of that report, without notice to the appellants.

Equity Rule No. 86, of the Supreme Court of the District of Columbia, is in the following language, to wit:

> "The auditor, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk on the docket. The parties shall have one month from the time of filing the report to file exceptions thereto, and if no exceptions are within that period filed by either party the report may be confirmed. If exceptions are filed they shall stand for hearing before the court at the next sitting thereof."

The confirmation of the report carried with it the right to a final decree. Equity Rule 64 of that court, is in the following language:

> "No cause in equity shall be set down for hearing unless the same be at issue and ready for hearing, or be properly set down for hearing, on bill and answer, or bill and answer and replication; and every such cause may be ordered by either party or his counsel to be placed upon the calendar, provided such order be given at least five days previous to the first day of the next term. Any case once properly set down for hearing and placed upon the calendar, if not disposed of by the court, shall remain upon the calendar in its proper order, unless otherwise directed by the court."

This rule relates to the setting of cases for hearing on bill, answer and replication; it has no application to a case which has once been heard and determined, and comes back for some further action. The rule never contemplated that it should be necessary to place the same case twice on the calendar, but when once properly calendared, must be considered as remaining upon the calendar until finally heard and determined.

The order referring the case to the auditor was, as suggested in the argument of this assignment, limited in scope, but it was as broad as was require by the condition of the case, and was in exact conformity to the judgment of the Court of Appeals in the case of Trust and Banking Com-

pany *vs.* Ice Company, *supra*. The following quotation is from the opinion in that case:

> "The question of the distribution and application of the proceeds of sale may affect, under the terms of the deed of trust, the American Ice Company and its general creditors, claiming under the general assignment to Johnson. Hence they have a right to a strict account of the proceeds of sale of the property in Maine. As to what allowances for disbursements, expenses, commissions, etc., are proper, will be for the court here to decide, in order to make proper distribution of the proceeds of sale of the property in this jurisdiction. That such exhibits should be made, and a proper account stated as preliminary to the decree of sale of the property here, we think is proper and necessary. Until this account is stated, it can not be determined with certainty for what amount the decree for foreclosure and sale should be passed, or what amount of indebtedness is still due."

Had the appellants desired a different order of reference to the auditor, they should have made application for such order to the court that made the reference. Failing that, it is too late to suggest such an objection for the first time, in an appellee court. Appellants were not injured by the calendaring of the case without notice. The case was regularly on the assignment, and called for a hearing on May 19th, in the Supreme Court of the District of Columbia, sitting as an equity court. Appellants were allowed until May 14th in which to prepare for argument and hearing, at which time the motion to strike from the calendar was filed. The rule of the Supreme Court of the District of Columbia requiring equity cases to be calendared and notice to be given to the opposing party five days before the next term of court, exclusive of Sundays, was for the purpose of affording time to the clerk of the court to make up the calendar, and for the party to whom notice was given to make objec-

tions to a case being calendared, because it was not ready for hearing under the terms of the rule.

Appellants knew that the auditor had completed his audit; that his report had been filed, and that of itself conveyed implied notice to them that the taking of evidence on the part of appellee was concluded. Yet, during all that time, appellants expressed no desire to take testimony in the case. The long time consumed in taking the additional testimony, which was taken after the decision in the Trust and Banking Company *vs.* Ice Company, was largely owing to the difficulty experienced in obtaining the attendance of appellants at the hearing before the auditor. Whether counsel for appellants argued his motion to strike the case from the calendar in the Supreme Court of the District of Columbia is a question of no importance, as he was present when the decree was passed overruling the motion and directing the sale, and suggested the name of one of the trustees who were to make the sale. His motion to strike from the calendar, because he had no notice of the calendaring of the case, was only one of the subject-matters of said motion. The motion also opposed any sale being made because of the pendency of the Potomac Flats Case, which appellants contended had not been decided, within the meaning of the opinion of the Court of Appeals in this case; and that appellants should be entitled to compensation for services rendered, and moneys expended in the prosecution of that suit, and that they should be allowed to take evidence in that behalf before a sale could be properly made. The filing of such motion amounted to a general appearance, and would have given a court having jurisdiction of the subject-matter, authority to hear and determine the case.

The cases touching this point, found in appellants' brief, have no application to the point under discussion. Each of these cases relate to the obtention of jurisdiction of the person of the defendant, at the inception of the cause, and have no application to a case where the parties are already before

the court by subpœna and answer. When jurisdiction of the defendant has once been properly obtained, any irregularity in the proceedings, touching the service of notice, can in no wise affect the jurisdiction of the court. Such irregularity may furnish ground of appeal, but can in no wise vitiate the validity of a decree or judgment. In each of the cases cited, the question of jurisdiction was raised by special motion for that purpose, or by demurrer; and this court held that the overruling of the motion or demurrer, still preserved the question of jurisdiction in the record. In this case, appellants coupled their motion to strike from the calendar, with an application for the extension of time to take testimony, and an objection to a decree for sale. This, of itself, amounted to a general appearance in the case, such as would have given the court, at the initial stages of the case, jurisdiction of the persons of the appellants.

Commenting on this assignment of error, the court below said;

> "They [the appellants] had their day in court, and they were not prejudiced by any failure of notice to appear. And so far as this assignment of error has reference to supposed imperfections in the audit, or in the scope of the reference to the auditor, it would have been easy to cure them, either by exceptions to the auditor's report, or by testimony before the auditor, or by application to the court to enlarge the scope of the reference, no one of which was sought to be done. It is too late for the appellants to complain in this court of that which was their own failure in the court below. We find no merit in this first assignment of error."

It is respectfully submitted that this assignment of error is without merit.

III.

"The court erred in decreeing a sale pending the litigation in the Potomac Flats Case."

Much of appellants argument under their third assignment of error appears to be devoted to a vindication of the course pursued by the appellant assignee, in his conduct in relation to the Potomac Flats Case, from the seeming aspersions cast thereon by the Court of Appeals. As this seems to be a controversy as to propriety of conduct, waged between the appellant assignee and the court below, the writer of this brief will abstain from making any comments thereon, and will leave the parties mostly interested to settle their difficulties in such mode as may seem to them advisable.

The Court of Appeals of the District of Columbia rendered a decision on the first appeal in this case, on February 28, 1899. At that time, the case of Morris *vs.* United States, commonly known as the Potomac Flats Case, involving the title of the land comprising the bed of the Potomac River, was pending in this court. In reversing the decree of the court below for the sale of the property, the Court of Appeals directed that no sale of said property should be made until the Potomac Flats Case had been decided. For, said the court—

> "otherwise the sale of the property made subject to the final decree of that case, could not be otherwise than a mere speculation, and would most certainly result in obtaining nothing more than a nominal sum" (14 App. D. C. 337).

The Potomac Flats Case was decided May 1, 1899. The title of the bed of the Potomac River was adjudged to be in the United States. But the court further held that the claimants were entitled "to the value of their respective rights, titles and interests, ascertained and awarded to them"

(174 U. S. 291.) And it referred to the following cases on the method to be pursued in ascertaining such value.

Monongahela Nav. Co. *vs.* United States, 148 U. S. 312.

Hazel *vs.* B. & O. RR. Co., 169 U. S. 22.

There are only two possible elements of value that can be claimed by the parties interested in said property. One is the value of the improvements; the other, the income derived from the property, or what might be reasonably derived therefrom. The element of uncertainty of value arising from the condition of the title of the property has been removed by the decree in the Potomac Flats Case. How is the value of the rights of the claimants to be ascertained? Clearly by evidence showing the income derived from the property, or which might be obtained therefrom, by proper management, by ascertaining from persons competent to judge, the value of the wharves and other improvements. Such information is equally available to any person who desires to deal with the property, as it is to the courts, in a formal judicial investigation. The value of such interests is no more indefinite or uncertain, than is the value of property that is constantly being sold by judicial process. The property in controversy is now in possession of the purchaser, under the decree of the court, as hereinbefore stated. The Government has not attempted to take possession of the property, nor has it taken any evidence to ascertain its value. For nearly a year last past, the Attorney General has caused surveys to be made of the riparian properties involved in the Potomac Flats litigation, and has taken some steps looking to the ascertainment of the claims of private persons to the wharf property along the river front; but no evidence has been offered by anybody looking to the ascertainment of the value of the property in suit. As was said by Justice Morris, speaking for the court below, discussing this branch of the case:

"All the parties seem to be willing to permit the matter to rest indefinitely and until some emergency arises to demand energetic action, which may possibly be in the remote future.

"The American Ice Company, one of the appellants in this case, was a party to the Potomac Flats Case, and participated in the conduct of that litigation until the final decision by the Supreme Court. The Eastern Trust and Banking Company, the appellee here, was not a party to that suit; and it is argued here, on behalf of the appellants that it could not now be permitted to intervene in it in any manner. And the argument is further, that until the rights of the American Ice Company shall have been determined in the Potomac Flats Case, or in other words, until the American Ice Company thinks proper to move in the Potomac Flats Case for a valuation of its interest, which, of course, it may postpone forever, if it chooses, there can be no sale of that interest, and no decree should be rendered for such a sale. But the very statement of such a proposition as this is sufficient to discredit it. Were we to adopt it as the law of this case as now developed, it would simply be an invitation to the American Ice Company to take advantage of its own inactivity in order to perpetrate a wrong on the appellee. What the valuation of its interest in the premises would prove to be, if actively pressed to a determination, we can not, of course, anticipate; but it may be questioned, from the record of this litigation, whether it would be sufficient to satisfy the claims of the appellee and its other creditors. The American Ice Company therefore, has probably no motive of self interest to move for the ascertainment of the value of its interest in the property in controversy; and it does not seem to be eager to admit the appellee to a share of the work of inquiry into that matter. It seems never to have called upon it for assistance, or requested it to contribute to the expense; and yet one of the grounds of complaint here on the part of the appellants is that the appellee has not contributed to the cost of litigation."

Ice Co. *vs.* Banking Co., 17 App. D. C. 428.

The Court of Appeals furnishes its own commentary upon what it meant by staying the sale of the property until after the decision in the Potomac Flats Case; and its negative upon the construction put by appellants upon such direction, is a sufficient answer to appellant's contention.

IV.

"The court erred in not requiring the complainant trustee to make contribution to the costs of the litigation in the case of the United States *vs.* Morris, known as the Potomac Flats Case, and in not remanding the case to the Supreme Court of the District, for that purpose."

In this assignment of error the appellants make the extraordinary suggestion that they are to be paid by the bondholders for professional services rendered and for money expended in the Potomac Flats litigation, and argue that, as they were under no obligation to defend the suit for the benefit of the bondholders, and because they will be benefited by the result obtained in that litigation, the appellee should bear a portion of the expense attending that litigation. There is no pretense that the appellee authorized any expenditure of money in the defense of that case; on the contrary, when requested, it expressly declined to authorize the appellant assignee to represent the appellee in that litigation, or to expend any money therefor. It was a trustee for, not the owner of the property. It had no power, even if it had desired, to have entered into contract with appellants respecting the litigation in question. It was not necessary to protect the interests of the bondholders under the trust.

Precisely the same result would have been reached, so far as appellee is concerned, had appellants not expended the money and performed the labor which they suggest have been expended and performed in the premises. There

were many other parties engaged in the same litigation, and numerous other counsel engaged in the same cause, who filed briefs, and orally argued the case in both courts. The appellant, William G. Johnson, as assignee of the American Ice Company, has in his possession, as such assignee, all the funds obtained from a sale of the property belonging to said company except such as is embraced in this deed of trust, or upon which there were specific liens, together with a large amount of rent collected from a part of the property described in said deed of trust, situate in this city. Appellants were not going to war at their own charges. This fund will be liable to the holders of the bonds secured by the deed of trust, in suit, after the appellee has exhausted its remedy upon the property embraced in the deed of trust, and it will be entitled to participate with the unsecured creditors ratably in the distribution of that fund. It was for appellants' interest, therefore, to make the defense in the Potomac Flats Case, if any was to be made; and whether any ought to have been made or not, was committed to the honest discretion of the assignee; but how he can make himself, either in the character of assignee, or as attorney or counsellor at law, the creditor of the appellee, not only without its consent, but against its express notification and protest, is a little difficult to understand. A proper interpretation of the deed of trust before the court makes it the duty of the American Ice Company to defend the title to the property embraced in the trust, if such defense should become necessary. The limiting clause in the deed purports to convey a fee simple title in and to the property embraced in the trust, and article 9 of the trust contains a covenant whereby the grantor therein agrees from time to time, during the existence of said trust, to make, execute, acknowledge and deliver all such further instruments and conveyances as, in the opinion of counsel, may be necessary to facilitate the execution of said trust, or further to secure the *rights and remedies* of the holders of

said bonds (Rec. pp. 24, 25 and 28). This is equivalent to a representation on the part of the grantor and its successors and assigns that they had a fee simple title to said property, and certainly it would estop said grantor from ever after asserting claim against said trustee under said deed of trust, to any after acquired interest or right therein, whether acquired by conveyance or as the result of litigation.

Van Rensselaer *vs.* Kearney, 11 How. 297.

The betterments upon the property in controversy were upon the property at the time the bondholders advanced their money upon the security afforded by the deed of trust. No improvements have been made upon the land since; on the contrary, such improvements as were there have been rendered nearly valueless by fire. The title to the land covered by the wharf and improvements has failed, and appellants' argument is that the appellee shall not have the benefit of the improvements. Just why the value of the improvements should not inure to the benefit of the parties secured by the trust is not apparent, unless the court is to apply the scriptural principle that "from him that hath not, shall be taken away even that which he hath."

V.

"The Court erred in not dismissing the bill, because of the inequitable abuse of its trust by the trustee."

Appellants state under this assignment of error, that the sale made by the appellee in Maine, in September, 1894, was—

> "a mere ruse, by an apparent formal execution of the trust, to extinguish the equity of redemption of the mortgagor, and substitute, for the public sale, by the trustees, the private sale conducted solely by three bondholders, the trustees servilely obeying their directions in all things."

This is a serious imputation, and ought not to have found a place in appellants' brief unless warranted by the facts as established by the evidence. Appellants do not controvert, but admit that due notice was given, as required by the power of sale contained in the trust, of the three offerings made of the property, in the city of Bangor, State of Maine. Mr. John Miller, a witness on behalf of the appellee, and holding $9,800 of the bonds secured by the trust, says, in substance, that he attended the sale in Bangor in May, 1894; that there were twenty-five or thirty persons present at the sale; that the offering was made by an auctioneer and a representative of the assignee; that there was no bid at that time of over $10,000, and the property was withdrawn; that the reason the property was not sold at that time was because it did not bring what it was worth. It was then postponed for one mouth, notice of the time and place being given at that time; that he attended the June offering; that no sufficient offering was made and the sale was again postponed to September; that there were present thirty or more persons at the last sale, and about a dozen bids were made; that the next best offer to that of the committee of the bondholders, was $13,000 or $13,500; that this was made by the Knickerbocker Ice Company, of Philadelphia; and that he, with the other members of the bondholders' committee, bid in the property for $14,000. In response to the interrogatory as to what effort was made at the time to make the sale, he said:

> "Well, we notified all the different ice companies all over the country that we thought might be likely to buy the property; people that would buy the property in New York and people that sell the ice in the city of Philadelphia and the people here in Washington."

Notice was given by the papers, through the mails and by personal notice (Rec. pp. 62, 63, 64 and 65).

After the property was struck down in this way to the

committee representing the bondholders it was held by the trustee and rented by it for a period of about two years, when the property was sold and the title transferred to the purchasers, who were the Consolidated Ice Companies of New York, for the sum of $16,500. The trustee, who held the legal title, and the committee representing the bondholders, who had the equitable title to the property, united in the deed to make title. The sale to the Consolidated Ice Companies was made by the committee of the bondholders (Rec. p. 81). The purchase money for the property was paid at the date of the last sale (Rec. p. 84).

During the period intervening between the date of the auction sale, September 8, 1894, and the sale to the Consolidated Ice Companies in March, 1897, the sum of $4,800 had been received by the Trust Company, as agent for the bondholders, for the rent of the property (Rec. p. 87). This is all the evidence found in the record touching the regularity of the sale, which the appellants designate as "pretended," and "a ruse." No motive is or can be suggested for the bondholders desiring to sell for less than the best price obtainable for the property, and it may be confidently assumed that such price was obtained.

It is respectfully submitted that these appellations are not warranted by the proof. The price at which the property sold at the last offering, at auction, was insufficient to discharge the bonded indebtedness. Had the purchase price been then paid in cash, by the purchasers, the bondholders would have been obliged to assess themselves in order to have made such payment to the trustee, and then they would have been entitled to have received the proceeds from the sale, back again, in the shape of a partial payment, less the expenses attending the execution of the trust; or they would have been entitled to pay the expenses of the sale, in cash, and, after having the net balance credited on their bonds, to have taken the immediate title to the property. Instead of doing this, they allowed the title of the property to remain

as it was until they succeeded in finding a purchaser therefor, at private sale; and then directed the trustee to make the deed, instead of directly to them, to the purchaser from them. No person was injured by this method of dealing with the property; on the contrary, the general creditors, who are the only persons for whom appellants have manifested any solicitude, were benefited. The bondholders, instead of making distribution upon the bonds, in accordance with their rights, under the sale at auction, of the 8th of September, 1894, settled with the bondholders on the basis of the private sale, and of the rents derived from the property between the dates of the two sales. This statement was entirely correct as to them, but it was incorrect as to the general creditors. All that they were entitled to, as against the general creditors, was a settlement on the basis of the sale of the property at public auction. The auditor took a different view of the subject, and stated his account on the basis of the sale of 1897 (Rec. p. 112). The auditor does not find that the sale of the property situated in Maine, which took place in September, 1894, was a mere formality. On the contrary, he does not attempt to pass on the validity of that sale (Rec. pp. 109–10–11–12). By so doing he would have overruled the judgment of the court which referred the case to him for audit, and of the Court of Appeals.

The regularity and validity of the sale was upheld, not only by Justice Cox, before whom the case was first heard, but also by the Court of Appeals in the case of the Trust and Banking Co. *vs.* Ice Co., 14 App. D. C., in which the court, speaking on this point, said:

> "There is no fraud charged, and no such irregularities shown, as furnish the foundation for impeaching the fairness and good faith of the sale that was ultimately made. The deed of trust was made in Maine, and the sale of the property situated in that State, was made there; and we must suppose, in the absence of any affirmative evidence to the contrary, that the sale was legally and fairly made. Both the

> law of the contract, and of the situs of the property sold, was that of Maine; and it does not appear that the sale has ever been questioned in that jurisdiction. We must therefore assume that the sale was validly made, according to the law and practice of that State" (p. 336).

The same question came before that court at the last hearing; and, in discussing this assignment of error, the court said:

> "The fifth and last assignment is that the bill of complaint should have been dismissed. It is not usual to consider a general assignment of this kind without some specification. It is true that there is in the brief for the appellants a suggestion in this connection that, in view of the sale or sales which had been made of property in Maine, the appellee should not now be permitted to have recourse to the property in this District. But, as the defendants have been given the benefit of all the sales in Maine and credited with the highest amount realized, and as that amount falls far short of discharging the indebtedness, it is not apparent why the mortgagee should be debarred from recourse to the other property covered by the mortgage. But this point does not seem to be seriously insisted on here by the appellants, and the assignment of error is no more than a merely formal assignment."
>
> Ice Co. vs. Banking Co., 17 App. D. C., 430.

The writer of appellants' brief urges that, as a punishment for the violation of its trust by the trustee, the bondholders secured by the trust have no right to enforce it, or to have it enforced in their interest. No citation of authority is made in support of this proposition, but it appears to be a mental conception of appellants' counsel alone. That a trust once validly imposed upon a property, should be invalidated, and the purposes of the trust defeated by the misconduct of the trustee, is a proposition new to the doctrine of trusts. The property has now passed into the hands

of an innocent holder for value, and it is probably too late for any irregularity in the sale, if any such there were, to be drawn in question. Certainly, this court must treat said sale as valid, unless it were absolutely void upon its face. It has no right to treat the sale as a nullity, on the ground of a mere irregularity.

The mandate of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District of Columbia, of May 15, 1900, with a modification, has been obeyed. The trustees appointed by the decree proceeded in the execution of the trust thereby reposed in them, and sold the property in controversy, at public auction, in accordance with the terms of said decree, to one John Miller, the holder and owner of certain of the bonds secured by said trust, for the sum of $7,000. The trustees reported the sale in the usual way, to the Supreme Court of the District of Columbia, and the same was finally ratified and confirmed. The proceeds derived from the insurance, amounting to the sum of $3,000, was paid over by the appellant, William G. Johnson, assignee as aforesaid, unto the said trustees, and said sum, together with the proceeds of sale, have been distributed to the present holders of the bonds secured by said deed of trust, and have passed beyond the control of the court. A reversal of the judgment of the Court of Appeals would not affect the title of the purchaser of said property, or invalidate in anywise the execution of the decree pronounced by the Supreme Court of the District of Columbia.

Morton's Admr. *vs.* Underwood et al., 49 Ala. 419.
Whiting *vs.* Bank of U. S., 13 Pet. 6.
Huyston's Iron Co. *vs.* Martin, 132 U. S. 96.
Jackson *vs.* Caldwell, 1 Cow. 641.
Taylor *vs.* Boyd, 3 Ohio, 337.
Gott *vs.* Powell, 41 Mo. 416.
McJilton *vs.* Lowe, 13 Ill. 495.
Reynolds *vs.* Harris, 14 Cal. 667.

The closing paragraph of appellants' brief, makes the extraordinary suggestion that appellees have now the power to abandon and nullify the sale made of the Maine property, and to bring that property to a resale, under this, or some other foreclosure proceedings. Just how this can be done, in the light of the facts disclosed in the record, the appellants fail to point out. A valid title to the property situated in Maine, could have been made either by sale under the deed of trust, in conformity with the power of sale therein contained, or by the judgment or decree of a competent court of the forum where the real estate is situated. By the terms of the trust, the sale must have taken place, in order to be valid, in the City of Bangor, State of Maine. Whether the sale of the 8th of September, 1894, should have been set aside for irregularity or not, is now too late to inquire. The appellants had not only constructive, but actual notice of the sale, and allowed two years and-a-half to elapse after such sale, without taking any steps in the forum where the transaction occurred, and where the real property is situated, to test its regularity, or to question its validity.

It is apparent that the bondholders, in any event, will be paid only about fifty per cent of the amount actually due them. This amount is being constantly depleted by the protracted litigation, much of which was unnecessary, which has extended over a period of more than eight years; and it is to be hoped that the judgment of this court will put an end thereto.

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